

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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TULE LAKE COMMITTEE,
Plaintiff,

v.

FEDERAL AVIATION ADMINISTRATION,
CITY OF TULELAKE, CALIFORNIA,
CITY COUNCIL OF THE CITY OF
TULELAKE, BILL G. FOLLIS, JUDY
COBB, PHIL FOLLIS, JACK
SHADWICK, RAMONA ROSIERE, and
MODOC NATION fka MODOC TRIBE OF
OKLAHOMA

Defendants.

No. 2:20-cv-00688 WBS DMC

MEMORANDUM AND ORDER RE:
MOTIONS TO DISMISS

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Plaintiff Tule Lake Committee brought this action against the Federal Aviation Administration ("FAA"), the City of Tulelake, California ("the City") and its City Council (collectively, "the City defendants"), as well as the Modoc Nation and individual members of the Modoc Nation's Tribal Council (collectively, "the tribal defendants"), alleging that

defendants' involvement in an agreement between the City and the Modoc Nation to sell land underlying the Tulelake Municipal Airport violated the National Historic Preservation Act, the terms of a federal land patent granting the land to the City, and a number of state statutes. The FAA, the City defendants, and the tribal defendants have moved to dismiss for lack of subject matter jurisdiction, failure to state a claim, and failure to join a necessary and indispensable party under Federal Rule of Civil Procedure ("FRCP") 19. (Docket Nos. 7, 12, 13).

I. Relevant Allegations

This case arises out of a dispute over property located on the site of a former Japanese internment camp at Tule Lake. (See Compl. ¶¶ 4, 14 (Docket No. 1).) In 1951, the United States conveyed 359 acres of the internment camp land to the City of Tulelake to use as an airport via a federal land patent. (Compl. ¶ 19.) The patent granting the City fee ownership of the property contained covenants requiring that the City develop an airport on the land and that the airport be operated as a "public airport." (Compl. ¶ 103.) Between 1974 and 2018, the City leased the airport property to Modoc County. (Compl. ¶¶ 21, 35.)

Plaintiff is a California non-profit public benefit corporation whose purpose is to preserve the history and experiences of the inmates of the Tule Lake camp, educate the general public about the false imprisonment of American citizens and immigrants of Japanese ancestry in the 1940s, and to recognize the unique role of the Tule Lake camp in the United States' system of Japanese internment. (Compl. ¶ 4.) Plaintiff has previously expressed the view that the airstrip on the

1 property at issue should be relocated to preserve historic
2 aspects of the property, including a cemetery that lay near the
3 edge of the airport grant. (Compl. ¶¶ 20, 43-48.)

4 Sometime before or during 2018, the City defendants
5 decided to sell their fee interest in the airport property to the
6 Modoc Nation. (Compl. ¶ 50.) Once plaintiff learned that the
7 City defendants were interested in selling the airport property,
8 it made several written offers to purchase the property for
9 \$40,000, and it appeared at an open City Council meeting on July
10 31, 2018 to express its interest. (Compl. ¶¶ 49-70.)

11 The City defendants voted to sell the airport property
12 to the Modoc Nation for \$17,500 at the conclusion of the July 31,
13 2018 City Council meeting, contingent upon the FAA consenting to
14 the transfer of the airport property to the Modoc Nation.
15 (Compl. ¶ 70, Ex. C.) On August 9, 2018, the City defendants
16 sent the FAA a copy of the parties' purchase and sale agreement
17 ("the Purchase Agreement") for the airport property and requested
18 that the FAA approve the sale. (See Compl. Ex. D.) A Manager
19 from FAA's Regional Airport Division Office issued a letter ("the
20 Armstrong Letter") in response, indicating that the office had no
21 objection to the proposed sale. (See Compl. Ex. F.)

22 Following the City defendants' decision to sell the
23 airport property to the Modoc Nation, plaintiff filed suit
24 seeking to set aside the sale of the airport property. (See
25 Compl. ¶¶ 191-200.) The complaint contains the following causes
26 of action: (1) violation of the National Historic Preservation
27 Act ("NHPA"), 54 U.S.C. §§ 306102-3016108, and Administrative
28 Procedure Act ("APA"), 5 U.S.C. §§ 702-706; (2) violation of the

1 1951 Federal Land Patent and the APA; (3) violation of the
2 California Surplus Act, Cal. Gov. Code §§ 54220-54222; (4)
3 violation of public policy; (5) violation of the Ralph M. Brown
4 Act, Cal. Gov. Code §§ 54953-54960; and (6) violation of 42
5 U.S.C. §§ 1981, 1983. (See generally Compl.)

6 II. Legal Standard

7 Federal Rule of Civil Procedure 12(b)(6) allows for
8 dismissal when the plaintiff's complaint fails to state a claim
9 upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The
10 inquiry before the court is whether, accepting the allegations in
11 the complaint as true and drawing all reasonable inferences in
12 the plaintiff's favor, the complaint has stated "a claim to
13 relief that is plausible on its face." Bell Atl. Corp. v.
14 Twombly, 550 U.S. 544, 570 (2007). "The plausibility standard is
15 not akin to a 'probability requirement,' but it asks for more
16 than a sheer possibility that a defendant has acted unlawfully."
17 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "Threadbare
18 recitals of the elements of a cause of action, supported by mere
19 conclusory statements, do not suffice." Id.

20 III. Discussion

21 The only federal claims that plaintiff raises in its
22 complaint are against the FAA.¹ Plaintiff first claims that the
23 FAA violated the NHPA, 54 U.S.C. § 306108, by approving the City
24 defendants' sale of the airport property without first complying

25 ¹ Though the complaint also claims that the City
26 defendants violated 42 U.S.C §§ 1981 and 1983, plaintiff conceded
27 in its opposition to the City defendants' motion to dismiss that
28 its complaint had not stated a § 1981 or § 1983 claim and
requested that the court dismiss that claim. (See Pl.'s Opp'n
City Def. Mot. Dismiss at 12 (Docket No. 16).)

1 with certain procedural requirements under the statute. (See
2 Compl. ¶¶ 77-92.) Plaintiff also claims that the FAA violated
3 the terms of the 1951 federal land patent by failing to prevent
4 the sale of the property to the Modoc Nation. (See id.)

5 A. Violation of the NHPA

6 Plaintiff's claim under the NHPA seeks judicial review
7 of the FAA's alleged approval of the sale of the airport property
8 under APA section 702. APA section 702 allows persons "suffering
9 legal wrong because of agency action, or adversely affected or
10 aggrieved by agency action within the meaning of a relevant
11 statute" to seek judicial review. 5 U.S.C. § 702.

12 Because section 702 grants judicial review for legal
13 wrongs caused by "agency action," in order for the court to have
14 subject matter jurisdiction over this claim plaintiff's complaint
15 must allege facts sufficient to support the conclusion that the
16 FAA's approval of the airport transfer was an "agency action".
17 Wild Fish Conservancy v. Jewell, 730 F.3d 791, 800-01 (9th Cir.
18 2013) (quoting Norton v. S. Utah Wilderness All., 542 U.S. 55,
19 61-62 (2004)); see also Fairbanks N. Star Borough v. U.S. Army
20 Corps of Eng'rs, 543 F.3d 586, 591 (9th Cir. 2008) (noting that
21 the presence of a final agency action is "a jurisdictional
22 requirement to obtaining judicial review under the APA"). The
23 APA defines "agency action" as "the whole or part of an agency
24 rule, order, license, sanction, relief, or the equivalent or
25 denial thereof, or failure to act." 5 U.S.C. § 551(13).

26 The complaint must also allege facts sufficient to show
27 that the FAA's action was "final" under the APA. Id. ("To
28 maintain a cause of action under the APA, a plaintiff must

1 challenge 'agency action' that is 'final.'" (quoting Norton, 542
2 U.S. at 61-62)); see also 5 U.S.C. § 704 (further limiting review
3 under the APA to "final agency action for which there is no other
4 adequate remedy in court") (emphasis added). The Supreme Court
5 has articulated a two-part test to determine if an agency action
6 is "final" under the APA:

7 First, the action must mark the consummation of
8 the agency's decisionmaking process--it must not
9 be of a merely tentative or interlocutory nature.
10 And second, the action must be one by which
rights or obligations have been determined, or
from which legal consequences will flow.

11 Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (internal quotation
12 marks and citations removed).

13 Here, plaintiff's complaint identifies two potential
14 agency actions taken as part of the FAA's approval: first, that
15 the Armstrong Letter acted as a "permit, license, or approv[al]"
16 for the City defendants to sell the airport property to the Modoc
17 Nation (See Compl. ¶ 85); and second, that the FAA's failure to
18 carry out the NHPA's procedural requirements prior to approving
19 the sale of the airport property constituted a reviewable agency
20 action (See Compl. ¶ 86). For the following reasons, neither
21 action qualifies as "agency action," much less "final agency
22 action," under the APA. See Wild Fish Conservancy, 730 F.3d at
23 800-01.

24 1. The Armstrong Letter

25 The Armstrong Letter is not "agency action" because it
26 is not the type of "circumscribed, discrete agency action[]" that
27 is ordinarily the subject of judicial review. See Norton, 542
28 U.S. at 62. "The definition of [agency action] begins with a

1 list of five categories of decisions made or outcomes implemented
2 by an agency--'agency rule, order, license, sanction [or]
3 relief.'" Id. (quoting 5 U.S.C. § 551(13)).

4 The Armstrong Letter--which plaintiff attaches to the
5 complaint as an exhibit--does not fall under any of those five
6 categories. (See Compl. Ex. F.) The Letter outlines the terms
7 of the parties' Purchase Agreement and acknowledges that the
8 operator of the airport is subject to existing obligations under
9 the law to receive federal grant funding from the FAA. (See id.)
10 It then states that "based on [the] information and the
11 conditions provided [by the parties], the FAA has no objection to
12 the proposed Purchase Agreement of the Airport property from the
13 City to the Tribe." (Id.)

14 The Armstrong Letter is essentially an advisory opinion
15 informing the parties to the Purchase Agreement of the airport
16 operator's obligations under law and under the terms of the 1951
17 land patent. It is not "an agency statement of . . . future
18 effect designed to implement, interpret, or prescribe law or
19 policy," 5 U.S.C. § 551(4) (definition of rule), or "a final
20 disposition ... in a matter other than rule making," see id. at §
21 551(6) (order). Nor is it a "permit ... or other form of
22 permission." See Id. at § 551(8) (license).

23 While Congress intended the APA's definition of an
24 "agency action" to be "'expansive,' federal courts 'have long
25 recognized that the term [agency action] is not so all-
26 encompassing as to authorize [federal courts] to exercise
27 judicial review over everything done by an administrative
28 agency.'" Wild Fish Conservancy, 730 F.3d at 800-01 (quoting

1 Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt., 460 F.3d 13,
2 19 (D.C. Cir. 2006)). By its own terms, the Armstrong Letter
3 does not purport to approve, license, or give permission for
4 anything. (See Compl. Ex. F.) It is therefore not an "agency
5 action" subject to judicial review within the meaning of 5 U.S.C.
6 § 551(13). See Wild Fish Conservancy, 730 F.3d at 800-01; see
7 also Bituminous Cas. Corp. v. Walden Res., LLC, 672 F. Supp. 2d
8 835, 845-46 (E.D. Tenn. 2009) (holding that an agency letter
9 describing the consequences of a party's failure to follow
10 federal law was not a final agency action, and that it was
11 "doubtful that [the] letter constitute[d] 'action' at all").

12 Even if the Armstrong Letter were an "agency action"
13 subject to review, the court would still lack subject matter
14 jurisdiction because the Letter's issuance does not meet either
15 of the finality requirements set out in Bennett. See Bennett,
16 520 U.S. at 177-78. First, the Letter does not "mark the
17 consummation of the agency's decisionmaking process." See id.
18 It does not appear to have been issued as the result of any sort
19 of formal decisionmaking process by the FAA; in fact, a Manager
20 from the agency's Regional Airport Division Office issued the
21 Letter just eight days after receiving the City's request. (See
22 Compl. Exs. D, F.) The FAA did not hold hearings, solicit
23 additional input, or rely on any other evidence beyond the
24 Purchase Agreement before it issued the Letter. (See id.) In
25 fact, the Letter specifically notes that it only "represents the
26 present views of the FAA's Regional Airport Division Office," not
27 the views of the FAA as a whole. See Soundboard Ass'n v. Fed.
28 Trade Comm'n, 888 F.3d 1261, 1268 (D.C. Cir. 2018), cert. denied

1 sub nom. Soundboard Ass'n v. F.T.C., 139 S. Ct. 1544 (2019)
2 (holding that an informal agency letter did not represent the
3 consummation of the agency's decisionmaking process because it
4 only expressed the views of agency staff, not the agency as a
5 whole).

6 Second, the issuance of the Armstrong Letter is not an
7 action "by which rights or obligations have been determined, or
8 from which legal consequences will flow." Bennett, 520 U.S. at
9 177-78. Plaintiff's complaint does not identify--and the court
10 is not aware of--any authority that requires the FAA to approve a
11 sale or transfer of the airport property to the Modoc Nation.
12 Instead, the complaint alleges that the FAA had to decide whether
13 to approve the sale of the airport property because the parties
14 agreed to condition the sale of the property on FAA approval.
15 (See Compl. ¶ 64.)

16 An agency action cannot become final merely because
17 private parties agree to treat it as determinative. The APA
18 requires that rights, obligations, or legal consequences flow
19 from agency action, not the parties' own, self-imposed contracts.
20 See Bennett, 520 U.S. at 177-78 ("[T]he action challenged must be
21 one by which rights or obligations have been determined, or from
22 which legal consequences will flow." (emphasis added) (internal
23 quotation marks omitted)). Because the Purchase Agreement is the
24 only alleged source of legal rights, obligations, or consequences
25 that could flow from the FAA's issuance of the Armstrong Letter,
26 the Letter cannot constitute a "final" agency action. See id.

27 In short, an informal agency letter that (1) merely
28 advises the City defendants and the tribal defendants of

1 independent legal obligations that arise under federal law and
2 the 1951 land patent, (2) does not represent the view of the
3 agency as a whole, (3) does not purport to approve or license the
4 sale of the airport property in any way, and (4) does not give
5 rise to any legal rights, obligations, or consequences outside of
6 a private agreement between the City defendants and the tribal
7 defendants is not reviewable under the APA. The court therefore
8 lacks subject matter jurisdiction to review the FAA's issuance of
9 the Armstrong Letter under the statute. Wild Fish Conservancy,
10 730 F.3d at 802.

11 2. Failure to Act Pursuant to the NHPA

12 The FAA's failure to consider the impact of the sale of
13 the airport property under the NHPA was also not a final agency
14 action. While a failure to act can constitute an agency action
15 under the APA, see 5 U.S.C. § 551(13), the plaintiff must "assert
16 that an agency failed to take a discrete agency action that it is
17 required to take." Norton, 542 U.S. at 64 (2004).

18 Here, the complaint alleges that NHPA section 106
19 requires the FAA to consider the impact of its actions on
20 historic property. (See Compl. ¶ 82.) Specifically, section 106
21 states that "prior to the approval of the expenditure of any
22 Federal funds on [a Federal] undertaking or prior to the issuance
23 of any license, [the agency] shall take into account the effect
24 of the undertaking on any historic property." 54 U.S.C. § 306108
25 (emphasis added).

26 The FAA's failure to act under NHPA section 106 cannot
27 constitute a final agency action because section 106 only imposes
28 an obligation on the FAA prior to the agency's approval of the

1 expenditure of federal funds or issuance of a license. See id.
2 As noted above, the FAA did not issue any license or approval of
3 the sale of the airport property in this case, and plaintiff has
4 not identified any source of law authorizing or requiring the FAA
5 to issue such an approval or license. The complaint therefore
6 does not allege that the FAA failed to take any discrete agency
7 action that it was required to take. See Norton, 542 U.S. at 64
8 (2004).

9 Accordingly, neither the FAA's issuance of the
10 Armstrong Letter nor its failure to act under the NHPA constitute
11 a "final agency action" by the FAA. Bennett, 520 U.S. at 177-78.
12 The court therefore does not have subject matter jurisdiction
13 over plaintiff's claim that the FAA violated the NHPA by
14 approving the transfer of the airport property to the Modoc
15 Nation, and the court will dismiss plaintiff's first claim
16 against the FAA. See Wild Fish Conservancy, 730 F.3d at 802.

17 B. Violation of the 1951 Federal Land Patent

18 Plaintiff next claims that the FAA violated the terms
19 of the 1951 federal land patent by failing to enforce its
20 provisions. Plaintiff's complaint claims that the land patent
21 contains a covenant that prohibits the airport property from
22 being conveyed to the Tribal defendants. (See Compl. ¶¶ 94-105.)
23 As with its first claim, plaintiff seeks judicial review of the
24 FAA's failure to enforce the terms of the 1951 land patent under
25 APA section 702. (See Compl. ¶108.)

26 For the same reason that the court lacks subject matter
27 jurisdiction over plaintiff's claim that the FAA failed to comply
28 with procedural requirements imposed by the NHPA, the court also

1 lacks subject matter jurisdiction over plaintiff's claim that the
2 FAA failed to enforce the terms of the 1951 land patent. Though
3 failures to act are reviewable the APA, see 5 U.S.C. § 551(13),
4 the plaintiff must "assert that [the] agency failed to take a
5 discrete agency action that it is required to take." Norton, 542
6 U.S. at 64 (2004). Here, plaintiff's complaint does not
7 identify--and the court is not aware of--any authority that
8 requires the FAA to enforce the terms of the 1951 land patent.
9 The FAA's failure to enforce the land patent is therefore not an
10 "agency action" within the meaning of the APA. See id.
11 Accordingly, the court will dismiss plaintiff's second claim for
12 lack of subject matter jurisdiction. See Wild Fish Conservancy,
13 730 F.3d at 802.

14 C. Supplemental Jurisdiction

15 Because the court will dismiss plaintiff's only federal
16 claims, the court no longer has federal question jurisdiction.
17 See id. Federal courts have "supplemental jurisdiction over all
18 other claims that are so related to claims in the action within
19 such original jurisdiction that they form part of the same case
20 or controversy under Article III of the United States
21 Constitution." 28 U.S.C. § 1367(a). But a district court "may
22 decline to exercise supplemental jurisdiction . . . [if] the
23 district court has dismissed all claims over which it has
24 original jurisdiction." 28 U.S.C. § 1367(c); see also Acri v.
25 Varian Assocs., Inc., 114 F.3d 999, 1001 n.3 (9th Cir. 1997) (en
26 banc) (explaining that a district court may decide sua sponte to
27 decline to exercise supplemental jurisdiction). The Supreme
28 Court has stated that "in the usual case in which all federal-law

1 claims are eliminated before trial, the balance of factors to be
2 considered under the pendent jurisdiction doctrine--judicial
3 economy, convenience, fairness, and comity--will point toward
4 declining to exercise jurisdiction over the remaining state-law
5 claims." Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7
6 (1988).

7 Comity weighs in favor of declining to exercise
8 supplemental jurisdiction over plaintiff's state law claims
9 because the state court is competent to hear those claims and may
10 have a better understanding of the relevant state law. As for
11 judicial economy, this action is still at the motion to dismiss
12 stage, and plaintiff's state law claims have not been the subject
13 of any litigation. Judicial economy does not weigh in favor of
14 exercising supplemental jurisdiction. Lastly, convenience and
15 fairness do not weigh in favor of exercising supplemental
16 jurisdiction. The federal and state fora are equally convenient
17 for the parties. There is no reason to doubt that the state
18 court will provide an equally fair adjudication of the issues.
19 Accordingly, the court declines to exercise supplemental
20 jurisdiction and will dismiss plaintiff's remaining state law
21 claims.

22 IT IS THEREFORE ORDERED that defendants' motions to
23 dismiss (Docket Nos. 7, 12, 13) be, and the same hereby are,
24 GRANTED.

25 Plaintiff's claims against defendant Federal Aviation
26 Administration are DISMISSED WITH PREJUDICE. Plaintiff's claim
27 against defendants City of Tulelake and the City Council of
28 Tulelake under 42 U.S.C. §§ 1981, 1983 is also DISMISSED WITH

1 PREJUDICE. Plaintiff's claims under California law against
2 defendants City of Tulelake, City Council of the City of
3 Tulelake, Bill G. Follis, Judy Cobb, Phil Follis, Jack Shadwick,
4 Ramona Rosiere, and the Modoc Nation are DISMISSED WITHOUT
5 PREJUDICE to refiling in state court. The Clerk of Court shall
6 enter final judgment in favor of all defendants.

7 Dated: September 24, 2020



8 **WILLIAM B. SHUBB**

9 **UNITED STATES DISTRICT JUDGE**